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IN THE

Supreme Court of the United States

October Term, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the M/V "LAURA MAERSK",

Respondent.

Petitioner's Reply to Respondent's Brief.

OTTO WOLFF, JR.,
1500 Lincoln-Liberty Building,
Philadelphia, Pa.,
Counsel for Petitioner.

International, 236 Chestnut St., Philadelphia

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IN THE

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No. 56. October Term, 1943.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB,"

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE M/V "LAURA MAERSK,"

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

THE QUESTION PRESENTED.

The respondent asserts (Respondent's Brief, p. 6) that the only question presented by the differing views of the Judges of the Courts below is whether the possibility that the "BOHEMIAN CLUB" might foul the buoy presented "a danger of such consequence as to justify the action of the master of the 'BOHEMIAN CLUB' in shifting his vessel at 10.13 A. M. from a position *near the easterly edge of the channel* to a position in midstream *athwart the range line,*" etc. (italics supplied); and then contends that she was moved from a position "of comparative safety" (Respondent's Brief, p. 5), to a position "in mid-channel, where she presented an obstruction to either up or down bound vessels navigating on the ranges" etc. (Respondent's Brief, p. 11).

We therefore respectfully direct the attention of the Court to the fact that the Courts below did not find that the "BOHEMIAN CLUB" moved from a position "near the easterly edge of the channel" to a position "in midstream athwart the range line." The findings were:—(1) that the "BOHEMIAN CLUB", immediately before shifting her position, was headed on approximately 30 degrees (Finding 10, R. 93), with the buoy 2-D about 150 feet distant, at an angle of about 45 degrees off the starboard bow (Finding 9, R. 93);—and since the course of the Bulkhead Bar range was 9 degrees (R. 16), the "BOHEMIAN CLUB" was, therefore, not "near the easterly edge of the channel", but was lying *athwart* the easterly side of the channel, as shown on the diagram attached to our brief; and (2) that she was moved to a position where (italics supplied) she "was located in the channel with *her bow* approximately *on* the Bulkhead Bar Range course * * * her stern tailing *to the west* as her heading was still about thirty degrees" (R. 105; Finding 21, R. 94), as likewise shown on the diagram attached to our brief.

The respondent further asserts (Respondent's Brief, p. 7):

> "The question is not whether the 'BOHEMIAN CLUB' violated the Act of Congress of March 3, 1899, (Appendix I, p. 22) for she plainly did violate the specific provisions of that Act when she anchored the second time. * * * The only question presented is whether that violation can be excused or condoned on the ground of necessity."

That it became necessary again to anchor the "BOHEMIAN CLUB" a second time, at 10.18 A. M., where she then was, is, however, not disputed by the respondent.

It became necessary, as the District Court (Finding 14, R. 93; Conclusion 2, R. 100), and the Circuit Court of Appeals (R. 104-105), both found was the fact, because of a sudden redescent of the fog which again obscured entirely the Buoy 2-D and thereafter left the master of the "BOHEMIAN CLUB" without any indicia of position. The question, therefore, is not whether anchoring the "BOHEMIAN CLUB" can be excused or condoned, since that must be conceded, but whether the decision of her master to move away from the buoy was a fault.

If it be said that the master of the "BOHEMIAN CLUB" ought to have recognized the possibility that a sudden redescent of the fog might again compel him to anchor before he had completed his maneuvers, then that is but a circumstance to be considered in determining whether his decision to move away was a fault. If his judgment, at the time and under the circumstances shown, was proper, as we contend it was, for the several reasons set forth in our brief (pp. 15 to 23), then, we respectfully submit, he is not answerable for the consequences resulting from the necessity for anchoring which subsequently arose.

THE RESPONDENT'S CONTENTION THAT THE DECISION OF THE MASTER OF THE "BOHEMIAN CLUB" TO MOVE HIS VESSEL AWAY FROM THE BUOY CANNOT BE JUSTIFIED, IS UNTENABLE.

The respondent asserts (Respondent's Brief, p. 7) that the possibility that the "BOHEMIAN CLUB" might foul the buoy involved a "relatively trivial risk," and that (Respondent's Brief p. 15):

> "Contact with a floating buoy could in no event have caused any substantial injury to a large steamer

such as the 'BOHEMIAN CLUB.' It would only have possibly resulted in dragging or displacement of the buoy."

What might have happened, had the "BOHEMIAN CLUB" fouled the buoy, is altogether speculative. She might not only have dragged or displaced the buoy, as the respondent concedes, but, in doing so, her rudder or propeller, or both, might have become entangled in the mooring cable of the buoy, in which event the "BOHEMIAN CLUB" (435 feet long; Finding No. 3; Record p. 92) would then have been helpless and out of control, and in danger of being carried by the wind and tide outside the channel limits until she grounded. And since, moreover, the Buoy 2-D was a "flashing" buoy (Respondent's Brief p. 12), and also carried a bell, as will appear from the chart attached to the Respondent's Brief, the jagged edges of its superstructure, which carried the buoy's light and bell, might have punctured the hull of the "BOHEMIAN CLUB." What might have happened the master of the "BOHEMIAN CLUB" had no means of knowing; but for the purposes of this case, we respectfully submit, the fact that, in his judgment, made on the spot, the situation was one which involved a danger to his vessel was a sufficient justification for what he undertook to do. The reasonableness of his decision to move his vessel away from the buoy was not questioned by any witness at the trial. On the contrary, as the learned Trial Judge observed (R. p. 98), the respondent itself suggested at the trial, and subsequently argued, not that the "BOHEMIAN CLUB" ought to have remained at anchor where she was, but "should have proceeded around the bend and anchored on the Deepwater Point Range when the fog cleared partially shortly after 10 A. M., or should have sought an

anchorage outside the Bulkhead Bar Range channel at that time." The propriety of moving the "BOHEMIAN CLUB" away from the buoy was thus, in effect, conceded by the respondent at the time of the trial.

We also respectfully emphasize the broader aspect of the question presented. In the interests of public safety it is essential that navigators be encouraged to be alert to the possibilities of any situation which may confront them, and to take whatever precautionary measures they may deem proper for the safety of the human lives and property entrusted to their care. The responsibility which is theirs should, we therefore respectfully submit, carry with it a wide margin of discretion, and their judgment should not be condemned save in cases where, upon clear and convincing evidence, it was manifestly faulty.

The respondent also contends that where the "BOHEMIAN CLUB" was first anchored at 7.41 A. M. her position, although within the channel limits, was "one of comparative safety" (Respondent's Brief p. 5); and that (Respondent's Brief p. 11) where she was subsequently anchored at 10.18 A. M. "she presented an obstruction to either up or down bound vessels *navigating on the ranges as is customary in these water.*" (Italics supplied.)

That vessels in these waters, whether up-bound or down-bound, customarily navigate on the ranges is an assertion *unsupported by any evidence.*

There is likewise no evidence to support the respondent's assertion (Respondent's Brief p. 9) that "it is clear" that the three vessels bound down stream, which safely passed the "BOHEMIAN CLUB" while she was anchored on

the easterly side of the range line, "passed down almost exactly on the range line, not to the west of it." The channel, on the easterly side of the Bulkhead Bar Range, was 400 feet wide (Finding 11; R. 93); the "BOHEMIAN CLUB's" bow was 150 feet from the easterly side of the channel (Finding 9; R. 93); and the three vessels in question passed her "about 200 feet off" (R. 7)—"around 200 feet off" (R. 23). But it is also to be noted that the "BOHEMIAN CLUB" was lying athwart the channel, headed on 30 degrees (Finding 10, R. 93), and that the distance from the "BOHEMIAN CLUB" at which these three vessels passed her was at best but a rough approximation. The master of the "FRANKLIN," when asked how far off she was when she passed the "BOHEMIAN CLUB" testified (R. 23):

> "Well, it is very hard to determine in a fog. I would judge around 200 feet, around the length of the 'FRANKLIN.'"

The evidence therefore fails to disclose where, with respect to the range line on the Bulkhead Bar Range, the three vessels in question were navigating. They were obligated, however, under Article 25 of the Inland Rules of Navigation, Act of June 7, 1897, 30 Stat. 101; 33 U. S. C. A. Sec. 210 (cited on page 20 of our brief) to keep to their starboard side of the fairway or mid-channel; and the presumption that they did so, in compliance with their statutory obligation, must prevail.

The "BOHEMIAN CLUB," in the position where she was first anchored at 7.41 A. M. on the easterly side of the range line, was, manifestly, an obstruction to other vessels bound up stream. The course up the Bulkhead Bar Range is 9 degrees (R. 16); but the set of the ebb tide was in a southwesterly direction (Finding 18, R. 94), and therefore when

the "BOHEMIAN CLUB" settled with the tide on 30 degrees (Finding 10, R. 93), she was lying athwart the easterly side of the channel, as shown on the diagram attached to our brief. In the position in which she was subsequently anchored at 10.18 A. M., with her bow approximately on the range line, and with her stern tailing to the westward thereof (Finding 21, R. 94), she no longer obstructed the passage of vessels bound up stream, but did, at least partially, obstruct the passage of vessels bound down stream. Her first position, therefore, was not one of "comparative safety," as the respondent contends (Respondent's Brief p. 5); but since she was under the necessity of anchoring where she did, she did not violate the provisions of the Act of Congress. We therefore respectfully submit that the subsequent change in her position to a point where she no longer obstructed the passage of vessels bound up stream, but did, at least partially, obstruct the passage of vessels bound down stream, is a matter of no consequence. If a vessel anchors in the navigable channel of a river in such a manner as to prevent or obstruct the passage of other vessels, then whether she has thereby violated the provisions of the Act of Congress approved March 3, 1899, is a question which, obviously, must be determined by the circumstances as they existed at the moment when she anchored. If she was *then* justified in anchoring, her justification continues, and she cannot thereafter be held at fault if another vessel comes into collision with her. The respondent, nevertheless, contends (Respondent's Brief p. 10):

> "The majority concede that the first anchorage, taken by necessity, might not have incurred 'liability-creating possibilities' (R. 115). The point is not important be-

> cause the collision was not with an upbound vessel and the 'LAURA MAERSK,' downbound, probably could not have complained that her passage was obstructed by the 'BOHEMIAN CLUB' while that vessel was on the easterly side of the channel."

It is to be noted that the conclusion reached by the majority of the Circuit Court of Appeals was not, that in the position of her first anchorage, the "BOHEMIAN CLUB" "*might* not have incurred liability-creating possibilities," but that she "*did not* incur liability-creating possibilities" (R. 115; italics supplied).

In contending that whether or not the "BOHEMIAN CLUB" "incurred liability-creating possibilities," in her first anchorage is not important "because the collision was not with an upbound vessel," the respondent submits an argument which implies that the course taken by another vessel which comes into collision with the anchored vessel is the decisive factor in determining whether or not the anchored vessel was anchored in violation of the provisions of the Act of March 3, 1899. The fallacy of this contention, we respectfully submit, is apparent; and since, because of her length, and the set of the tide, it would have been impossible for the "BOHEMIAN CLUB" to have anchored, at any point in the channel, without constituting herself an obstruction to the passage of other vessels, we again respectfully submit that the justification for anchoring the "BOHEMIAN CLUB" at 7.41 A. M. continued until the collision occurred, and was not affected by her subsequent change in position. She was as much of an obstruction to the passage of other vessels in her first position as she subsequently was in her second position; and she owed no

greater duty to vessels proceeding down stream than she did to vessels proceeding up stream.

The respondent contends (Respondent's Brief p. 18) that a violation of the provisions of the Act of March 3, 1899, may be condoned or justified only "under extraordinary circumstances." That, we respectfully submit, is not the construction placed upon the Act of Congress by the applicable decisions of the Circuit Court of Appeals.

In *The Socony No. 9* (C. C. A. 2) 74 Fed. 233, 234 (Petitioner's Brief pp. 9, 18, 19) the excuse given by the master of the anchored vessel for remaining at anchor in the fairway of a navigable channel in time of fog, was that "with that draft of water we can't go into every pier," and that it therefore seemed safer for his own vessel to stay where she was. The Circuit Court of Appeals for the Second Circuit held:

> "That was not a very convincing excuse, and yet we are disposed to accept his judgment made at the time, under the doctrine of *The A. P. Skidmore*, 115 Fed. 791 (2 C. C. A.); *City of Norfolk*, 266 Fed. 641, 645 (4 C. C. A.) and *Northern Queen*, 117 Fed. 906.
> * * *
> "The choice was doubtful whatever it was, and there is no such clear weight against the master's judgment, made on the spot, as to charge his vessels."

Similarly, in *The City of Norfolk* (4 C. C. A.) 266 Fed. 641, 645 (Petitioner's Brief pp. 9, 10, 19) the Circuit Court of Appeals for the Fourth Circuit, referring to the Act of March 3, 1899, held:

> "If the navigator of the vessel upon careful consideration of all the circumstances, reasonably con-

cludes that necessity requires anchorage, he should not be held at fault, and in case of collision should be held entitled to the presumption in favor of a vessel at rest against a moving vessel."

In *The Battler* (C. C. A. 3) 72 Fed. 537, 540, 541, certiorari denied, 163 U. S. 697 (Petitioner's Brief p. 19), the Circuit Court of Appeals for the Third Circuit rendered its decision on February 18, 1896, and therefore prior to the Act of March 3, 1899. The question presented, however, was whether the master of a tug had selected a safe and proper anchorage for his tug and barges while awaiting the subsidence of unfavorable weather, and was thus analogous to that in the instant case. The Court held:

"But, even if the proofs did not completely vindicate the tug's choice of an anchorage, still, in view of the conflict of opinion between the two sets of nautical witnesses, and under the facts shown, the utmost that could fairly be alleged against the master of the 'BATTLER' would be that he made a mistake of judgment, as manifested by the result. The James P. Donaldson, 19 Fed. 264."

"A mere mistake of judgment, however, under the circumstances, is not enough to fasten liability upon the owner of the tug. Id: The Packer, 28 Fed. 156."

* * *

"The master of the BATTLER is to be judged by the state of affairs which existed when he acted, and not by the after event."

Moreover, in *The Caldy*, 123 Fed. 802 (D. of Md.) affirmed 153 Fed. 837 (C. C. A. 4) (Petitioner's Brief p. 8) the District Court, referring to the Act of March 3, 1899, said (p. 805):

"Unquestionably, the Act of Congress being in aid of commerce and navigation should receive a sensible construction to further that end * * *.

"So far as concerns the liability in case of collision, the statute probably only emphasizes the previously existing maritime law. It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel. Spencer on Collisions, § 152."

We therefore respectfully submit that the Act of Congress approved March 3, 1899, should be construed with due regard to the fundamental duty of a navigator, when confronted with a situation which he believes to be one of danger, to take such precautions as he, in the exercise of his judgment as an experienced navigator may deem expedient for the safety of his vessel; and that, as the Circuit Court of Appeals for the Second Circuit held in *The Socony No. 9, supra*, his judgment, "made on the spot," should be accepted, even when the reasons assigned by him therefor are "not very convincing," and another course was "theoretically" possible.

In the instant case the "BOHEMIAN CLUB" *did not anchor voluntarily* where she did at 10.18 A. M.—she anchored *under the stress of necessity* because of the redescent of the fog. The sole question presented, therefore, is whether the decision of her master to move away from the buoy was a fault; and in determining that question, we respectfully submit, the established rule of law that navigators are not to be charged with negligence unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown, should govern.

In a footnote to page 9 of their brief the respondents say that the diagram appended to the petitioner's brief "is misleading in that the dimensions of the 'BOHEMIAN CLUB' are incorrectly represented." The diagram correctly represents the findings made by the Courts below, and was intended only to illustrate these findings. The scale of the drawing is 200 feet to an inch; the "BOHEMIAN CLUB" was 435 feet long (Finding 3; R. 92); and on the diagram the "BOHEMIAN CLUB" measures exactly 2 3/16ths of an inch, i. e. 437.50 feet. The difference of 2.5 feet is negligible. The diagram was not intended to show the width or contour of the "BOHEMIAN CLUB"; the Courts below made no findings as to her width, nor does that appear in the testimony. The respondent's criticism of the width of the "BOHEMIAN CLUB," as shown on the diagram, is, however, well taken, since the "BOHEMIAN CLUB's" moulded beam was 57 feet, and her registered beam was 57.2 feet. As drawn on the diagram, therefore, the width of the "BOHEMIAN CLUB" appears as approximately twice what her width actually was. The error was inadvertent, and we respectfully ask the Court to note our correction.

Respectfully submitted,

OTTO WOLFF, JR.,
1500 Lincoln-Liberty Building,
Philadelphia, Pa.,
Counsel for Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 975 56

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",
Petitioner,

—against—

A. P. MOLLER, Claimant of the Motor Vessel "Laura Maersk",
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEONARD J. MATTESON,
J. HARRY LABRUM,
Proctors for Respondent.

Dated, New York, May 17, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No......

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MOLLER, Claimant of the Motor Vessel "Laura Maersk",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This case arises out of a collision in the Delaware River between the Motor Vessel "Laura Maersk" and the Tank Steamship "Bohemian Club", as the result of which a libel and cross-libel in Admiralty were filed on behalf of the respective vessels. The District Court for the Eastern District of Pennsylvania held the Motor Vessel "Laura Maersk" solely at fault (R. 103). On appeal the Circuit Court of Appeals for the Third Circuit modified this result to the extent that both the Tank Steamship "Bohemian Club" and the Motor Vessel "Laura Maersk" were held at fault (R. 115). The judgment of the Circuit

Court of Appeals was first entered on October 21, 1942. A petition for rehearing was granted on December 3, 1942 (R. 129). The judgment of the Circuit Court of Appeals confirming its judgment of October 21, 1942 was entered on March 17, 1943 (R. 130).

Jurisdiction.

Jurisdiction is provided by 28 U. S. C. 347 (a).

Facts.

At 7.41 A. M. on December 20, 1939 the Tank Steamship "Bohemian Club" which had been proceeding up the Delaware River toward Philadelphia, Pennsylvania, with a cargo of crude oil, came to anchor in a dense fog on the Bulkhead Bar Range (Findings Nos. 3, 5, 7, 8; R. 103-4). Shortly after 10.00 A. M. a partial clearing of the fog made visible Buoy 2D which is located on the easterly side of the channel at the northerly end of Bulkhead Bar Range where that reach of fairway joins Deepwater Point Range (Finding No. 9; R. 104). Buoy 2D then lay about 150 feet distant at an angle of about 45° off the "Bohemian Club's" starboard bow (Finding No. 9; R. 104).

At 10.13 A. M. the "Bohemian Club's" anchor was raised and she executed a maneuver which shifted her to the westward farther out in the channel (Findings Nos. 14, 18; R. 104-5). During the maneuver Buoy 2D once more became obscured by fog and the "Bohemian Club's" master anchored his vessel not knowing his precise position. It was subsequently ascertained that when he again dropped his anchor

at 10:18 A. M. the "Bohemian Club" lay with her bow directly on the Bulkhead Bar Range Line near its juncture with the Deepwater Point Range Line with her stern tailing to the westward of the line on a heading of approximately 30°.

At the time of the collision the "Bohemian Club" was still anchored on the range line and in such a manner as to present an obstruction to the passage of other vessels undertaking to navigate on the range line and, particularly, ones approaching from the other range (Finding 24; R. 105-6).

The Question Presented.

The question presented is stated by petitioner as follows:

> "Is a navigator, who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, guilty of a violation of the Act of Congress approved March 3, 1899?"

We do not agree with this statement of the question. The real question presented is:

Was the "Bohemian Club" justified on the facts of this case in anchoring in thick fog across the range

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line in midchannel so as "to present an obstruction to the free passage of other vessels" (Finding 24; R. 105-6) in spite of the provisions of the Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409 making it unlawful to "anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft"?

The Decisions Below.

The District Court held that under the circumstances of the case the "Bohemian Club" was justified in moving from a safe anchored position at the edge of the channel to her position where the collision occurred (Conclusion 2; R. 112).

The majority of the Circuit Court of Appeals held that the circumstances did not justify the violation of the rule of the statute by the "Bohemian Club" (R. 121).

The dissenting judge of the Circuit Court of Appeals was of opinion that the master of the "Bohemian Club" acted prudently in moving his vessel from her original position to a position in midchannel because of danger of fouling a channel buoy on the turn of the tide (R. 123).

The case therefore involves only a difference of opinion on the part of the courts below on this point. The case involves only a question of fact decided adversely to the petitioner by the Circuit Court of Appeals.

Argument.

A. The Petitioner's Application Raises an Issue of Fact Only.

The contention of the petitioner is based upon a false premise. It is erroneously assumed that real danger existed which made it necessary to move the "Bohemian Club" away from Buoy 21). It was to avoid these supposed hazards which might result from the possibility of fouling Buoy 21) that the maneuver was undertaken which ultimately resulted in placing the "Bohemian Club" at anchor directly on the range line with her stern to the westward thereof.

The majority of the Circuit Court of Appeals correctly found that this alleged necessity was non-existent and that the maneuver was ill-chosen, having been undertaken at a time when the weather was "so unsettled that within five minutes after lifting anchor" and "when because of the density of the re-descending fog he no longer knew where he was, he found it necessary to again drop anchor" (R. 121).

The statement of the minority that "he took his vessel out of positive danger while he could do so" which forms the basis for petitioner's argument is without foundation in fact.

The record does not contain a scintilla of evidence to support such a conclusion. To the contrary, the record is replete with testimony showing clearly that the alleged danger was fancied rather than real.

The "Bohemian Club" originally anchored along the easterly end of the channel. At that time (7.41 A. M.) the tide was flood (R. 98). Approximately an hour and a half later the tide changed to ebb (9.10 A. M.) (R. 98). The "Bohemian Club" did not

foul the buoy when it swung with the tide from flood to ebb and there is no suggestion in the record that any difficulty was encountered. Yet, less than an hour after the tide had begun to ebb and at a time when the ebb tide had a minimum of two hours to run before a change took place, the "Bohemian Club" was moved from a demonstrated safe anchorage to a place where she was a "positive danger" to all vessels navigating the range.

The "positive danger" about which the petitioner speaks must relate only to the fancied danger of fouling the buoy. If such a danger actually existed, it was present at the time when the ship first anchored. It likewise was present when the vessel swung with the tide from flood to ebb. If it was a real danger, it would have manifested itself at that time. It may therefore be safely concluded that this alleged "positive danger" did not in fact exist. Certainly, there could have existed no more danger at a swing from ebb to flood than from flood to ebb. In fact, there would have been less danger to the ship, if any existed at all, because on the first swing from flood to ebb, the captain of the "Bohemian Club" acknowledged that he did not know the position of his ship while on the second swing he would have known his position by reason of his knowledge of the location of the buoy. In any case, as stated in his testimony, he could have prevented the fouling of the buoy "with the use of my engines" (R. 95).

B. On the Facts, as Found, the Decision of the Circuit Court of Appeals Is in Accord with the Controlling Authorities.

Petitioner strongly urges that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in the *Socony No. 9*, 74 F. (2d) 233, and the Circuit Court of Appeals for the Fourth Circuit in the *City of Norfolk*, 266 Fed. 641.

In both of these cases the court found that the action of the master in anchoring was necessary or "the better choice". In other words, the vessels were able to prove necessity and justify the violation of the statutory rule. Those cases are ruled by their particular facts and in no way conflict with the ruling of the Circuit Court of Appeals in the instant case. In the instant case the Circuit Court of Appeals found that no such necessity existed and that the maneuver undertaken at 10.13 to shift her position was ill chosen.

Where a vessel is guilty of a statutory fault, the burden rests upon her to prove that the violation of the statute was justified by reason of the rule of necessity. The "Bohemian Club" failed to meet this burden and justify its position.

Many cases support the finding of the Circuit Court of Appeals, some of which are the following:

The Caldy (D. C., D. Md., 1903) 123 Fed. 802, affirmed (C. C. A., 4th, 1907), 153 Fed. 837;

The Southern Cross (C. C. A., 2nd, 1937), 93 F. (2d) 297;

The Limon (C. C. A., 1st, 1929), 35 F. (2d) 730;

The Vera (D. C., D. Mass., 1912), 224 Fed. 998, affirmed (C. C. A., 1st, 1915), 226 Fed. 369;

The City of Birmingham (C. C. A., 2nd, 1905), 138 Fed. 555;

The Welcombe (D. C., E. D. N. Y., 1937), 19 F. Supp. 874;

The Lehigh (D. C., E. D. N. Y., 1935), 15 F. Supp. 425;

The Itasca (D. C., S. D., Ga., E. D., 1901), 117 Fed. 885;

In re Clyde-Mallory Lines (D. C., S. D. N. Y., 1937), 1937 A. M. C. 837;

The Georgia (D. C., D. R. I., 1913), 206 Fed. 635;

The Hans Maersk (C. C. A., 4th, 1937), 87 F. (2d) 193.

Petitioner under Point II of its brief in support of the petition for certiorari makes the specious contention that the "Bohemian Club" was in effect just as much of an obstruction as she lay anchored in close proximity to Buoy 2D marking the easterly boundary line of the channel as she was after she anchored at 10.18 A. M. with her bow directly on the Bulkhead Bar Range Line with her stern tailing to the westward thereof. Petitioner makes the following statement at page 21 of its brief:

> "The only difference in her position was that, at the time of the collision, her bow was on the range line with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the

> range line, with her stern 'near to or over the range line', as the learned dissenting judge said (R. p. 133)."

There is no justification whatever for such a statement either by counsel or the dissenting judge and that assumption was not accepted by the majority. On the contrary, as the majority correctly observed in their opinion (R. 121):

> "The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2D had passed in safety."

These were the Motor Vessels "White Flash", "Franklin" and an unidentified Finnish steamer (R. 91-2, 95-7).

A vessel anchored in the position in which the "Bohemian Club" was anchored at 7.41 A. M. on the edge of the channel line (not range line) close to Buoy 2D was not in a position such as to be a menace to vessels attempting to navigate on the range line.

The purpose of Buoy 2D was to mark the outer edge of the dredged channel. Obviously, it is most improbable that a vessel would undertake to navigate immediately along the edge of the channel where the "Bohemian Club" first anchored.

Vessels navigating either up or down the river would navigate on the range line, each giving way to the starboard thereof, as required when passing other vessels. Certainly a vessel anchored so as to be directly on this range line would be an obstruction to navigation in both directions, whereas, a vessel anchored on the edge of the navigable channel would not necessarily be an obstruction to vessels proceeding either way.

The Circuit Court of Appeals did not condemn the "Bohemian Club" for having anchored on the edge of the channel in a relatively safe position at 7.41 A. M., but, on the contrary, condemned her for having moved unnecessarily from this relatively safe anchorage to a position directly on the range line, thereby greatly increasing the hazard to such vessels as might be attempting to navigate the channel.

As was said in *The Caldy* (D. C., D. Md., 1903), 123 Fed. 802, aff'd (C. C. A., 4th, 1907), 153 Fed. 837, at page 805:

> "It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel."

The decision of the Circuit Court of Appeals very soundly holds that a navigator who through necessity has anchored his vessel in a dense fog on the edge of a navigable channel, leaving the range open to vessels which might attempt to navigate, shall not thereafter shift his vessel to a position directly on the range line, where she is a positive obstruction to vessels navigating the range, merely to avoid the possibility of fouling a buoy on the turn of the tide, anticipated some two or more hours later.

The "Bohemian Club" failed to meet the burden of proof and demonstrate that she was confronted with an "unavoidable emergency" or a "sudden exigency". The hazard was created by the "Bohemian Club" and the emergency was one which should have been anticipated and avoided. The Circuit Court of Appeals is entirely correct in finding that there was no real necessity for the "Bohemian Club" to shift her position and that the master showed poor judgment in doing so.

The testimony of the master of the "Bohemian Club" clearly indicates that there was no real hazard in the situation and no real necessity for shifting the position of the vessel. If the perils of fouling the buoy were real and not imagined they would not have arisen for several hours or until the ebb tide turned to flood.

If the Circuit Court of Appeals were to be reversed, and the "Bohemian Club" exonerated, it would be in effect a disapproval of the doctrine set forth in *The City of Norfolk* that—

> "the statute was intended as an explicit legislative statement that the dominant use of channels is for passage, and not anchorage, and it does not permit a vessel to anchor voluntarily in a channel when her presence there imperils other vessels * * *" (p. 644).

It would permit vessels to anchor in fog in the channel whether there was actual necessity or not without regard to the location in the channel and without regard to the safety of vessels undertaking to navigate.

The decision of the Circuit Court of Appeals in this case is neither in conflict with the case of the *Socony No. 9, supra*, decided by the Circuit Court of Appeals for the Second Circuit, nor *The City of Norfolk, supra*, decided by the Circuit Court of Appeals for the Fourth Circuit, nor is the result arrived at "very novel", nor does it misinterpret the Act of March 3, 1899, nor does it "render navigation more difficult", as suggested by petitioner (Petition for Writ of Certiorari, pp. 5, 6).

The decision of the Circuit Court of Appeals is amply supported by authority and no reason appears why the decisions below in this case should be reviewed by this Court.

Respectfully submitted,

LEONARD J. MATTESON,
J. HARRY LAFRUM,
Proctors for Respondent.

Dated, New York, May 17, 1943.